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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DONNA O'BALLE,

Plaintiff and Appellant,

v.

FIREMAN'S FUND INSURANCE
COMPANY,

Defendant and Respondent.

A151530

(San Francisco County
Super. Ct. No. CGC-10275693)

This is one of 19 appeals brought in this appellate district that arise from Fireman's Fund Insurance Company (Fireman's Fund) successfully obtaining relief from default judgments against its insured, Associated Insulation of California, Inc. (Associated), in asbestos personal injury cases. All 19 appeals involve the same superior court judge, but each has its own record. In this particular case, Fireman's Fund sought relief from a default judgment more than a year after it was entered, calling upon the trial court to exercise its equitable power in circumstances of extrinsic mistake. The issue before us is whether the trial court abused its discretion in ordering relief in this case. In light of the unusual procedural posture of this matter, we vacate the order and remand the matter for the trial court to provide a clearer explanation of its ruling.

FACTUAL AND PROCEDURAL BACKGROUND

In 2010, Donna O'Balle filed a complaint against numerous defendants alleging personal injuries from exposure to asbestos dating back to the 1980's. Associated, one of the defendants, was served, but did not respond; apparently, Associated went out of

business long ago. O'Balle filed a request for entry of default against Associated in May 2011 and an amended request in March 2012.

In February 2012, before the amended request for default was filed, O'Balle's counsel sent Fireman's Fund notice of O'Balle's lawsuit and a demand for coverage. There is no indication that the notice mentioned that O'Balle was seeking a default against Associated. Fireman's Fund responded to O'Balle's counsel in March 2012, stating that it had searched its records and had "not located any reference or policies of insurance issued to [Associated] under any [Fireman's Fund] company." Fireman's Fund wrote, "If you believe that [Fireman's Fund] issued policies of insurance to [Associated] please forward them and/or any secondary information you would like us to review, as soon as possible," and stated it would take no further action until it reviewed the alleged policies. The record does not reflect any response from O'Balle's counsel.

Three years passed, and in July 2015, a default judgment of \$2,191,750 was entered against Associated. O'Balle served notice of entry of the judgment on Associated, but not Fireman's Fund.

In August 2016, Fireman's Fund moved to set aside the default and default judgment on equitable grounds, after Fireman's Fund located an insurance policy that appeared to provide Associated with coverage for O'Balle's claim. The record before us does not reveal when Fireman's Fund located the policy or discovered that judgment had been entered. The attorney declaration filed in support of its motion states only that Fireman's Fund issued liability insurance to Associated; that in February 2016 "Fireman's Fund first retained counsel to defend any asbestos claims made against" Associated; and that Associated's corporate status had been suspended. Fireman's Fund argued in its motion that this is a "classic case of extrinsic fraud or mistake because Fireman's Fund was not represented by counsel, and has had no opportunity to be heard." O'Balle argued that Fireman's Fund failed to present evidence to satisfy the requirements for equitable relief from default judgment.

On December 7, 2016, the trial court held a hearing to consider motions to set aside defaults and default judgments against Associated in 13 cases, including O'Balle's.

At the December 7 hearing, reference was made that oral argument on the merits of the motion in O’Balle’s case (and some other motions for relief from default also on calendar that day) had taken place sometime earlier, although there is no transcript of that argument in the record. At any rate, by the December 7 hearing, counsel for the parties appeared to understand that the trial court would grant Fireman’s Fund’s motion as to the default judgment and deny it as to the default, and the only argument at the hearing that touched on O’Balle’s case concerned the form of the court’s order. The superior court judge stated that he was granting relief from the default judgments in all 13 of the cases based on “equitable principles,” but the judge did not state how the court applied these principles in O’Balle’s case, either on the record or in the written order that followed.¹

Fireman’s Fund informs us that the motions heard on December 7, 2016 in O’Balle’s case and the other cases are but a small sample of similar motions; that over a six-month period, from March through August of 2016, it sought to vacate default judgments against Associated in more than 200 cases in San Francisco Superior Court alone; and that the same superior court judge who ruled on the motion at issue here had heard many other such motions and was aware of facts that bear on the equities of this case.²

¹ Of the 13 cases decided at the December 7, 2016 hearing, only O’Balle’s case is among the 19 appeals pending in this appellate district.

² Indeed, Fireman’s Fund requests that we take judicial notice of all its filings over a period of six months as Associated’s insurer in 215 cases in San Francisco Superior Court, on the grounds that these filings shed light on how diligently, from March 1 to August 31, 2016, Fireman’s Fund sought to set aside the defaults and default judgments against Associated. Fireman’s Fund does not attach the filings to its request or point us to any particular documents, or identify any specific facts we might glean from them. We will not pore over filings from hundreds of cases in an attempt to discern what light they might shed on Fireman’s Fund’s diligence.

After briefing in this matter was complete, O’Balle asked us to take judicial notice of part of the record in one of those cases. We deny the request because the material is irrelevant.

DISCUSSION

We review an order setting aside a default judgment for abuse of discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).)³

A trial court has inherent power to vacate a default judgment on equitable grounds, even when relief is not available under Code of Civil Procedure section 473. (*Rappleyea, supra*, 8 Cal.4th at p. 981.) “One ground for equitable relief is extrinsic mistake—a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.” (*Ibid.*) When Code of Civil Procedure section 473 does not apply, the trial court can grant relief from a default judgment only in exceptional circumstances. (*Id.* at pp. 981-982.) Those circumstances must include “ ‘diligence in seeking to set aside the default once . . . discovered.’ ” (*Id.* at p. 982.)

Fireman’s Fund asserts that it first located a policy applicable to Associated in February 2016 and then quickly retained counsel and began moving to set aside defaults and default judgments. However, the only evidence in the record before us is that Fireman’s Fund hired counsel in 2016 to defend asbestos claims made against Associated and that six months later it moved to set aside the default and default judgment in this case. We cannot tell when Fireman’s Fund located the policy or when it discovered that judgment had been entered in this case.⁴

³ We note that the facts of this case are similar in some respects to those of *Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, where our colleagues in Division Five recently affirmed four similar orders entered by the same superior court judge setting aside default judgments that had been entered against Associated. In two of the *Mechling* cases, as here, Fireman’s Fund had received a notice from plaintiff’s counsel and demand for coverage. (*Id.* at p. 1245.)

⁴ Fireman’s Fund asks us to take judicial notice of “a court order and motion from the Alameda County Superior Court on the grounds these records concern virtually the same situation before the trial court here, and underscore the accuracy of its rulings.” We decline to do so. The Alameda County documents were not before the trial court here, and we generally do not take judicial notice of evidence not presented to the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Fireman’s Fund does not persuade us that any special circumstances exist to justify departing from the general rule.

But we are mindful of counsel's representations that the trial court, having presided over numerous cases with facts similar to those of O'Balle's case, was familiar with facts and circumstances not reflected in the record here. Therefore, we shall remand the matter to allow the trial court to explain how it exercised its discretion in granting Fireman's Fund's motion for relief from the default judgment.

DISPOSITION

The order appealed from is vacated and the matter is remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

Miller, J.

We concur:

Kline, P.J.

Stewart, J.

A151530, *O'Balle v. Fireman's Fund Insurance Company*